VOLUME 13 PART 9 — Pages 133-156

THE AUSTRALIAN LAWYER

being the
Thirteenth Volume of The
Australian Conveyancer and Solicitors Journal

SEPTEMBER 1960

BUTTERWORTH & CO. (AUSTRALIA) LTD.
(Incorporated in England)
SYDNEY: 6-8 O'Connell Street
MELBOURNE: 430 Bourke Street :: 240 Queen Street, BRISBANE

Registered in Australia for transmission by post as a periodical.

Please Remember

THE ROYAL RYDE HOMES

formerly

NEW SOUTH WALES HOMES FOR INCURABLES

When Advising on Charitable Bequests

THE ROYAL RYDE HOMES are undenominational

PRESIDENT:
THE HON. SIR KENNETH STREET, K.C.M.G.

CHAIRMAN:
ALAN M. SCOTT, F.C.A.

SECRETARY:
J. M. CORNWELL

FORM OF BEQUEST

I GIVE and BEQUEATH unto "THE ROYAL RYDE HOMES", in the State of New South Wales, the sum of

£..... (Free of Duty), and I declare that the receipt of the Secretary for the time being of the said HOMES shall be a sufficient discharge to my Executors.

SECRETARY:
J. M. CORNWELL, 259 Morrison Road, Ryde.
'Phone: WY 0281.

THE INDUSTRIAL ARBITRATION (AMENDMENT) ACT 1959

by

D. C. THOMSON, B.A., LL.B.
Senior Lecturer in Law, University of Sydney

PART I

There are few pieces of New South Wales legislation which receive such close and continuous attention as the Industrial Arbitration Act. Rarely a year passes without at least one amendment to this vital statute. Some of the changes are of small importance calculated to overcome some minor procedural difficulty which has arisen. But others—and this includes the Act under review—produce far-reaching changes which reflect basic attitudes on industrial relations policy.

The Bill, which with very few amendments passed into the Statute Book, was, according to Mr. Landa,[1] the result of an election promise made by the former Premier of New South Wales, the late Mr. Cahill, in February, 1959.[2] He also intimated that it represented the result of suggestions made to the Government by the industrial movement of the Australian Labour Party, the Chamber of Manufactures, the Employers' Federation of New South Wales, the Metal Trades Employers' Association and the Retail Traders' Association of New South Wales.[3] The Amending Act[4] contains sixteen sections, some of them quite lengthy, and deals with a number of matters. For convenience, however, they can be grouped under the following heads, viz., (1) the organization and general powers of the industrial tribunals, (2) independent contractors and employees (the vendor system), (3) obsolete provisions, (4) trade unions and (5) strike and lockouts.

[1] Mr. Landa (Minister for Housing and Minister for Co-operative Societies) was deputizing in the Legislative Assembly for Mr. Maloney (Minister for Labour and Industry), who is a member of the Upper House.

[2] Mr. Cahill stated that his Government would, if returned to power: (1) extend the powers of the Industrial Commission to award just and reasonable rates of pay, (2) ensure that compulsory training of apprentices was carried out in daylight working hours, and (3) amend the Industrial Arbitration Act to give greater emphasis to conciliation, as opposed to arbitration, reduce technicalities and streamline procedures generally.

[3] See N.S.W. Parliamentary Debates, 39th Parliament—Second Session (hereinafter referred to as Parliamentary Debates), 2021, 2110.

[4] Act No. 29 of 1959 (N.S.W.).

The organization and general powers of the industrial tribunals

The industrial arbitration machinery in New South Wales is made up of an Industrial Commission, some 400-odd Conciliation Committees, four Conciliation Commissioners, two Special Commissioners, two Apprenticeship Commissioners and some fifty (active) Apprenticeship Councils. The Commission consists of a President and six other members, all of whom are drawn from the legal profession and have the status and tenure of Supreme Court judges. The Committees, like the Victorian Wages Boards, are comprised of equal numbers of employer and employee representatives,[5] presided over by one of the four Conciliation Commissioners. The Committees are appointed for industries or callings or for groups or sections of industries or callings and may operate in relation to the whole or a part of the State or even a particular establishment. Apart from their chairmanship of the various Committees, the four Conciliation Commissioners have certain other functions, notably the settlement of actual or impending disputes. This latter task is also the responsibility of the two Special Commissioners who are situated at Newcastle and Wollongong respectively.[6] Apprenticeship and trainee-apprenticeship is regulated by the various Apprenticeship Councils, which consist of the Conciliation Committee for the trade or industry concerned, presided over by one of the Apprenticeship Commissioners. This basic structure has not been changed by the 1959 Act but the inter-relationship of the various tribunals has been re-organized.

Before the 1959 amendments, both the Commission and the Committees had an original jurisdiction in relation to most "industrial matters"[7]—they were both competent to make and vary awards. A party could thus apply either to a Committee or to the Commission, the choice being determined largely by the past history of the industry concerned. If a matter were heard, at first instance by the Commission, it could be dealt with either by a Full Bench or by a single judge. From the decision of a single judge an appeal lay to the Full Bench of the Commission. Appeals also lay from the Conciliation Committees, the Commissioners and the Apprenticeship Councils to the Industrial Commission, constituted either by a single judge or by a Full Bench of three members. Appeals were,

[5] They range in size from one to three members per side together with the independent chairman.

[6] The Special Commissioners are, in fact, the Superintending Inspectors of Factories at those centres.

[7] Certain matters, e.g., basic wage, standard hours, etc., were, however, excluded very largely from their province, being regulated directly by statute.

generally, by way of rehearing and, in cases other than an appeal from a single judge, could go through two stages, i.e., an appeal to a single judge with a further appeal to a Full Bench. Appeals, moreover, could be in respect of both law and fact.

This pattern has been radically changed by the Amending Act in an attempt to place greater emphasis on conciliation rather than arbitration, to simplify procedure and to shorten hearings—in essence to "streamline" the Act.[8] The draftsmen were obviously influenced, in this connexion, by the pattern and experience of the Commonwealth arbitration system.

The Industrial Commission now functions either in "court session" (which consists of the President and at least two other members of the Commission chosen by the President)[9] or as a single judge. The "court session" may, however, delegate its functions to a single member. Its jurisdiction enumerated in the new s. 30B,[10] covers appeals and references (on questions of jurisdiction only) from a single judge, a Committee, a Commissioner or an Apprenticeship Council,[11] appeals from the Registrar and appeals against the imposition of penalties. It is also the appropriate authority to deal with the deregistration of industrial unions and with the imposition of penalties for strikes and lockouts. Where, moreover, jurisdiction is conferred on the Commission by some other Act, e.g., Trade Union Act, Long Service Leave Act, it is to be exercised by the "court session". Provision is made, however, for the "court session" to deal, at first instance, with "industrial matters" referred by the Minister on his own motion or upon request of the President. In addition, the "court session" may "hear and determine any matter in any proceeding commenced or arising before a member of the (Industrial Commission) which such member considers ought to be removed to the . . . court session" provided the reference is approved by the Minister.[12] Just how far these powers will be used to enable a full bench to handle cases involving important issues of principle remains to be seen. But it is significant that the approval of the

[8] Parliamentary Debates 2343 (Mr. Maloney).

[9] Section 4(a)(i) (1959 Act) amending s. 14 (Principal Act). If the President is absent or is disabled from sitting in "court session" by reason of having previously dealt with the matter in question, the "court session" shall be presided over by the next senior member of the Commission.

[10] Inserted by s. 5(1)(i) (1959 Act).

[11] See ss. 14(8)(b)(e), 30C (Principal Act) as amended by 1959 Act.

[12] Section 30B(1)(h)(i) (Principal Act) inserted by s. 5(1)(i) (1959 Act).

Minister is required in all cases. If this approval is not forthcoming, discrepancies and illogical distinctions could emerge, a consequence not conducive, in the Australian scene, to good industrial relations. It is noteworthy that in 1952 this type of problem induced the Commonwealth Government to introduce a system of appeals and references from the Conciliation Commissioners to the Full Arbitration Court. Apart from this special jurisdiction conferred on the "court session" by the new s. 30B, the powers of the Commission are exercised by a single judge.[13] From his decision there is no appeal, except where a question of jurisdiction is involved.

The (theoretical)[14] option of applying either to the Commission (now a single judge)[15] or to the Committees for an award or variation of an award has been retained. But the Conciliation Committees and the Commissioners now have greater autonomy in that the allocation of their work is handled by the Senior Conciliation Commissioner and not by the Commission, as was previously the case. The status of the Commissioners has also been enhanced by the new Act, for a Commissioner now holds office until he attains the age of 65 years, and not merely for a seven year term, as was previously the case.[16] His tenure of office is, under the new Act, equivalent to that of a Commissioner in the Commonwealth jurisdiction.

Significant also are the changes in relation to: (1) the power of the Conciliation Commissioners, the Special Commissioners and the Conciliation Committees to make interim awards in settlement of disputes, (2) the variation of awards continued in force after the expiration of their term, (3) the system of appeals, (4) the power to award "just and reasonable rates" and, (5) the jurisdiction of the Apprenticeship Councils (and the Commission on appeal) in relation to daylight training and indentures. These matters will now be considered *seriatim*.

(1) Interim awards in settlement of disputes

By s. 17 (4) of the Principal Act,[17] a Special Commissioner may, if unable to induce the parties to a dispute to settle the matter by agreement, decide the issue himself. His decision is binding on the parties for a maximum period of a month and is, unless all the parties to the

[13] The work of the Commission is allocated by the President. However, past practices will influence the actual allocation.

[14] In practice some industries have always gone direct to the Commission while others have used the Conciliation Committees as the tribunals of first instance—see *supra*.

[15] See *supra*.

[16] In fact, he could be (and was) re-appointed until attaining the age of 65 years.

[17] Inserted by s. 4(c)(ii) (1959 Act).

dispute have requested him to determine the matter and have agreed to abide by his decision, subject to appeal to the Commission.[18] Previously Special Commissioners were limited to the conciliation of disputants and, although they performed very useful work, were handicapped by their (legal) inability to decide the issue themselves. The new measure will enable them to provide, at least, a temporary solution of the problem which, in most cases, may well be more permanent. Rather similar is the new power conferred on Conciliation Commissioners and Conciliation Committees sitting on a compulsory conference convened to deal with a dispute or cessation of work. Where they are of the opinion that the public interest is likely to be adversely affected by the dispute or stoppage, the Commissioner or the Committee, as the case may be, may make an interim award, of not more than one month's duration, restoring the *status quo ante*.[19] From such an award an appeal lies to the Commission,[20] but even where the Commission changes the interim award, its order is not to take effect until the period of the interim award has expired. Here, the policy of the Act is to provide a "cooling off" period and thus enhance the chances of peaceable negotiation.

(2) PIECEMEAL VARIATION OF AWARDS

By s. 87 of the Principal Act, awards may be made for a maximum term of three years, but by virtue of that provision they are continued in operation after the expiration of their term, until varied or rescinded. It is the long established policy of the New South Wales tribunals to vary awards during their term only for "good and cogent reasons".[21] It was also the accepted policy that expired awards, continued in force by s. 87, should not be varied in piecemeal fashion.[22] The result was that a party to an award (normally the union) which was seeking merely a few changes in an "expired" award, was compelled to go through the whole process of obtaining a new award covering every aspect of the employment relationship. In fact, most award provisions remain virtually unchanged over long periods, the main area of claims being in relation to wage rates. The amending provisions are designed to overcome this problem and allow piecemeal variations of

[18] I.e., to a single judge—see *infra*.

[19] Section 25(5) (Principal Act) inserted by s. 5(1)(f) (1959 Act).

[20] I.e., to a single judge—see *infra*.

[21] *Re Government Railways & Tramways* (*Moulders'*) *Award* 1928 A.R. 566, cf. *Re Glass Makers'* (*Australasian Window Glass Pty. Ltd.*) *Award* 1949 A.R. 490.

[22] *Re Colliers* (*State*) *Award* 1956 A.R. 58.

an award, the term of which has expired but which is continued in operation by s. 87 of the Principal Act.[23] The amendment does not, however, affect the variation of awards whose term has not expired which, it may be assumed, will continue to be varied only "for good and cogent reasons".[23A]

(3) THE SYSTEM OF APPEALS

The system and nature of appeals operating before the 1959 Act has already been briefly explained. The purpose of the amendments is to limit the number and length of appeals and to simplify their procedure for "justice delayed may be justice denied". Under the 1959 Act "appeals" fall into two main categories, viz., appeals *stricto sensu* and references of questions of jurisdiction.

Appeals on questions of fact or law (including questions of jurisdiction) still lie from the Commissioners, the Committees[24] and the Apprenticeship Councils to the Commission.[25] But this general rule is now subject to one important exception. The 1959 Act[26] provides that where an award or order has been made by the consent of all parties, which fact is certified by the Commissioner or Committee concerned, then no appeal will lie from that award or order. The object of this provision is to prevent parties, who had raised no objections to the claim at first instance, from instituting a series of lengthy, and perhaps costly, appeals. This limitation does not apply, however, to the Crown which may still (through the Minister) appeal against a consent award where, in his opinion, the public interests are likely to be affected.[27] Nor, strangely enough, does this limitation seem to apply to an Apprenticeship Council. Whether this represents an oversight or the result of deliberate policy it is hard to say, but if it is the latter, then it is difficult to see why this distinction should have been made between the various tribunals. Where an appeal does lie, it is now heard by a single judge only, whose decision is final, except where a matter of jurisdiction is involved, in which case a further appeal lies to the Commission in "court session".[28] "Questions of jurisdic-

[23] Sections 5(1)(b) and 5(1)(k) (1959 Act) amending ss. 21 and 32 (Principal Act).

[23A] See now *Re Chemical Workers' (Newcastle, Etc.) Award*, 17/1960—not yet reported.

[24] Including the new appeals created in the amendments to ss. 17A and 25 of the Principal Act. See notes 17, 20 *supra*.

[25] Sections 24(8), 28(9) (Principal Act).

[26] Section 24(9A) (Principal Act) inserted by s. 5(1)(e) (1959 Act).

[27] See s. 24(7) (Principal Act) as amended by 1959 Act.

[28] Sections 14(8)(a)(b) (Principal Act) as amended by s. 4(a)(ii) (1959 Act).

tion" are obviously narrower than "questions of law", but their scope is far from clear. The words "questions of jurisdiction" appeared in s. 77 (3) of the Principal Act until the repeal of this provision by the 1959 Amending Act. The scope of that provision was examined in *Re Rock and Ore Milling (State) Conciliation Committee*[29] but this case casts little, if any, light on the meaning of "questions of jurisdiction". Jurisdiction is defined in the Shorter Oxford English Dictionary[30] as "the range of judicial or administrative power; the territory over which such power extends".[31] Elaborating this short definition, jurisdiction may be said to refer to the presence (or absence) of power in a tribunal. Where power is clearly vested in a statutory tribunal, the manner of its exercise will not raise "questions of jurisdiction" unless this amounts to a transgression of the limits of power. In determining whether a statutory tribunal has jurisdiction to act in a particular manner, regard must be had, of course, to the provisions empowering such tribunal to ascertain whether the act in question is *ultra vires*. "Questions of jurisdiction" would, on this basis, seem to include such issues as whether a matter inserted in an award is an "industrial matter", whether compulsory unionism is included within a statutory power to award "absolute preference",[32] whether a Conciliation Committee may make an award dealing with apprenticeship and whether, to take a far-fetched example, a Conciliation Commissioner could fine an industrial union for an illegal strike. On the other hand, a claim by employers that a wage increase should not have been granted or that a dismissed employee should not have been reinstated would not, except in very rare circumstances, raise "questions of jurisdiction". If the above interpretation is correct, it seems unlikely that many "questions of jurisdiction" will come before the "court session".

Where a single judge is sitting at first instance on a matter his decision is now final, except where questions of jurisdiction are involved, in which case a further appeal lies to the Commission in "court session".[33] Where, however, he is acting as a delegate of the "court session" there is no appeal, on any ground, from his decision.[34] In an

[29] 1946 A.R. 719. See also, *Chambers* v. *John Hunter & Sons* 1912 A.R. 57.

[30] (3rd ed.) Vol. 1 at p. 1074.

[31] See also, Webster, *New International Dictionary* (2nd ed.) at p. 1346; *Encyclopaedia Britannica* (1950) Vol. 13 at p. 196; Earl Jowitt, *The Dictionary of English Law* (1959) Vol. 2 at p. 1030.

[32] Subject of a later article.

[33] See note [28] *supra*.

[34] Sections 30B(1)(a) and 30B(2) of Principal Act inserted by s. 5 (1)(i) (1959 Act).

appeal to the "court session" the judge who sat on the matter from which the appeal lies, is debarred from sitting on the Full Bench unless his order or award was made *"pro forma* by consent of the parties"[35] — this simply repeats the principle laid down in s. 14(8)(c) of the 1940-1958 Act.

Provision is also made in the Amending Act for the reference of questions of jurisdiction to the Commission in "court session". All the New South Wales tribunals, i.e., a single judge (except where acting as a delegate of the "court session"), the Commissioners, the Committees, the Apprenticeship Councils may, where questions of jurisdiction arise, decide the matter themselves. As we have seen, however, an appeal will lie, mediately or immediately, from their decision to the Commission in "court session". Alternatively, these bodies are empowered to reserve such questions for the "court session".[36] The object of the above provisions is, of course, to limit the right of appeal on ordinary "industrial matters" but at the same time to provide a full "judicial" bench to deal with difficult jurisdictional questions. Whether this somewhat arbitrary division will provide a satisfactory and balanced solution remains to be seen.

The nature of appeals was also drastically overhauled by the 1959 Amending Act. Prior to the Act, appeals from the Committees were by way of re-hearing.[37] As can be imagined, this could involve protracted hearings, needless repetition and considerable expense where a series of appeals was instituted. Now the Act expressly prohibits a re-hearing and requires that the appeal "shall be determined solely on the evidence placed before the committee or conciliation commissioner".[38] Further evidence, not available at the time of the original hearing, is to be admitted on special grounds only and not without the leave of the Commission.[39] There is a like restriction on the admission of further evidence in appeals from a single judge to the "court session".[40] It will have been noticed

[35] Section 14(8)(d) (Principal Act).

[36] See ss. 14(8)(e) and 30C (Principal Act) inserted by ss. 4(a)(ii) and 5(1)(i) (1959 Act). Cf. s. 77(3) (Principal Act) deleted by s. 7(a) (1959 Act).

[37] Section 24(9) (1940-1958 Act).

[38] Section 5(1)(e) (1959 Act) amending s. 24(9) (Principal Act).

[39] Section 5(1)(e) (1959 Act) amending s. 24(9) (Principal Act).

[40] Section 14(8)(d) (Principal Act) inserted by s. 4(a)(ii) (1959 Act). This, in effect, gives statutory recognition to the principle enunciated in *Re Meat Industry Employees' Union, Etc.* 1953 A.R. 34.

that no provision was made in the 1959 Act requiring appeals from a single judge or from a Conciliation Commissioner to be "not by way of re-hearing". This was so because in both cases it was established that such appeals were "true" appeals.[41] However, s. 28 (9) of the Principal Act still provides that appeals from Apprenticeship Councils *shall* be by way of re-hearing. Is this the result of an oversight or do apprenticeship appeals merit different treatment?

A further important change was the abolition of the Commission's power to suspend the awards made by Conciliation Commissioners or Committees.[42] Previously, a party could apply for, and often obtain, a suspension of an award pending an appeal against it. If the appeal were prolonged, the benefits of the (new or varied) award were, during this time, denied to the employees. The Government felt that the suspension provisions operated inequitably against employees and should be repealed.[43] This amendment does not, it would seem, apply to appeals from a single judge or from an Apprenticeship Council. In both cases, it has previously been held that the Commission has an implied power to suspend their awards.[44] Does this mean that this power still exists?[45]

(4) JUST AND REASONABLE RATES

A most important change was the removal of word "lowest" in s. 20 (1) (a), (c) and (d) of the 1940-1958 Act and the addition of a new section (s. 23A), which states:

> "notwithstanding anything contained in this Act, a committee shall in exercising its powers under this Act, fix such prices for work done and rates of wages as the committee deems just and reasonable to meet the circumstances of the case."[46]

Although there was some opinion to the contrary, it was generally accepted that the word "lowest" in s. 20 (1) (a), (c) and (d) of the 1940-1958 Act limited the Committees to fixing *true minimum rates* for any particular

[41] *Re Meat Industry Employees' Union, Etc.* cited *supra* note [40] (s.14); *Re Dispute between Commonwealth Rolling Mills Pty. Ltd.* and *Federated Ironworkers' Association of Australia (N.S.W. Division)* 99 I.G. 445.

[42] Section 5(1)(e) (1959 Act) amending s. 24 (7)(8) (Principal Act).

[43] Parliamentary Debates, 2349 (Mr. Maloney).

[44] *Re Iron & Steel Works Employees', Etc., Apprenticeship Award* 1948 A.R. 79; *Re Government Railways, Etc., Award* 1928 A.R. 455.

[45] Somewhat akin to suspension was the power of the Commission under s. 31(2) of the Principal Act to, *inter alia*, prohibit proceedings of a Committee. This power was also repealed by s. 5(1)(j) of the 1959 Act.

[46] Inserted by s. 5(1)(d) (1959 Act).

class of work. It was not a jurisdiction to fix wages which, when fixed, became the lowest wages lawfully payable; it was a jurisdiction to fix "lowest" or minimum wages.[47] It may be added that this limitation could always be overcome by creating new marginal classifications in an award and prescribing the "lowest" rates for those classifications. The amending provisions are designed to overcome this real or supposed limitation.[48] There are, at present, a number of applications to have the 28 per cent marginal increase (granted in the Commonwealth Margins Case) incorporated in State awards. Increases have already been made in most cases on the grounds that in the light of all the relevant circumstances the increased rates were "just and reasonable rates" to meet the circumstances of the case. But this simply begs the question and it is certain that the meaning of these words will have to be explored sooner or later. So many possible criteria are involved in their meaning that it seems pointless to speculate as to what will be the outcome. It is clear, however, that the words in question do not apply to the basic wage, as such, but only to other forms of remuneration *considered as part of the total wage.* It is also clear that this new power is equally available to the Commission—this is so by virtue of s. 30 of the Principal Act which invests the Commission with all the jurisdiction of, *inter alia,* the Committees. But, it does not seem to apply to the Apprenticeship Councils. This would not be a serious limitation, however, as, in any case, they enjoy wide powers over wage fixation.[49]

(5) Changed apprenticeship provisions

The 1959 Act also made important amendments in relation to apprenticeship matters. In 1943 a new subsection (1A) was added to s. 28 of the Principal Act which was intended, *inter alia,* to enable the Councils to prescribe daylight training for apprentices.[50] In 1958, however, the Commission refused to permit all technical training to be done in the employer's time, saying that it was reasonable that the apprentice should make some personal contribution of his own time.[51] The purpose of the present amendment is to make it quite clear that where an Apprenticeship Council determines that facilities at technical schools are

[47] *Re Electricians' State Award* (1958)—reported in Nolan and Cohen, Industrial Laws Supplement 1958-1959, p. 40 *et seq.*

[48] See supplementary judgment of Taylor, J. (Pres.) in *Re Electricians' State Award,* cited *supra* note [47] and Parliamentary Debates 2349-2350 (Mr. Maloney).

[49] See s. 28(1)(b) (Principal Act).

[50] Parliamentary Debates 2350 (Mr. Maloney).

[51] *Re Sheet Metal Workers', Etc. (State) Apprenticeship Award* (1958) 13 I.I.B. 430.

available, the employer must allow the apprentice to do *all* his technical training at such establishment during daylight working hours.[52] Likewise, where a Council is of the opinion that no facilities are available but that the apprentice should do his technical training by correspondence, his employer must permit him to do such training during working hours.[53] The Parliamentary opponents of the Bill were divided in their approach to this measure. Some regarded it as a desirable change but others, voicing the view of the Commission in the *Sheet Metal Workers Apprenticeship Case*,[54] thought that it might make employers less willing to take on new apprentices. It seems unlikely, however, that it will have this effect, at least while economic conditions continue to be buoyant.

The 1959 Act also made some changes in relation to apprenticeship indentures. Under the 1940-1958 Act, there was no responsibility on any party to prepare such indentures. But this task is now the duty of the employer, who must execute apprenticeship indentures "within three months of the receipt by him of a written notification of the approval of the apprenticeship by the Apprenticeship Council".[55] The new Act also enables an employer to engage a potential apprentice (under 21 years of age) for a probationary period not exceeding three months. If both parties then agree to enter into apprenticeship indentures, the period of probation is counted as part of the training period.[56]

[52] Some large establishments provide their own technical training schemes for apprentices.

[53] Section 5(1)(g) (1959 Act) omitting s. 28 (1A)(d) and (e) (Principal Act) and inserting s. 2A.

[54] 13 I.I.B. 430.

[55] Section 5(1)(g) (1959 Act) amending s. 28(3) (Principal Act).

[56] Section 28(3)(d) (Principal Act) as amended by s. 5(1)(g) (1959 Act).

LIABILITY AND AUTHORITY OF THE EXECUTOR DE SON TORT

by

P. E. NYGH, LL.B.
Lecturer in Law, University of Tasmania

Who is an executor de son tort?

Anyone dealing with the assets of a deceased person so as to exercise control over them without having obtained a grant of Probate or Letters of Administration or without the authority of the legal personal representative, or taking the assets after death by virtue of a fraudulent conveyance from the deceased,[1] is liable as an executor *de son tort*.

It does not matter whether the intermeddler is named as the executor of the will of the deceased if he has in fact not taken out Probate.[2] The dealing need be slight only; thus the mere taking of the goods into one's possession may be sufficient,[3] and *a fortiori* any more emphatic acts of control over property will result in liability, such as giving a receipt for a debt due to the deceased,[4] paying some of the legacies,[5] transferring property to a foreign executor,[6] and carrying on the business of the deceased.[7]

In *Booth* v. *Public Trustee*[8] HUDSON, J. said[9] that the act of the intermeddler had to be wrongful in the sense necessary to constitute him an executor *de son tort* relying as authority for this proposition on the decision of the Court of Appeal in *Attorney-General* v. *New York Breweries Co.*[10] But it is submitted with respect that His Honour misinterpreted that case in which COLLINS, L.J., made it clear[11] that it was not the wrongfulness of the act which makes a man an executor *de son tort*, but his position as executor *de son tort* which makes his acts wrongful. His Lordship explained *Sykes* v. *Sykes*[12] to show that even the authority of the named executor who has not yet proved the will cannot save his agent from being

[1] *Edwards* v. *Harben* (1788), 2 Term Rep. 587.
[2] *New York Breweries Co.* v. *Attorney-General*, [1899] A.C. 62.
[3] *Kellow* v. *Washcombe* (1673), 1 Freem. K.B. 122.
[4] *Stokes* v. *Porter* (1558), 2 Dyer 166B.
[5] *Re Lovett, Ambler* v. *Lindsay* (1876), 3 Ch. D. 198.
[6] *New York Breweries Co.* v. *Attorney-General*, [1899] A.C. 62.
[7] *Hooper* v. *Summersett* (1810), Wight 16 and see generally Mr. Ottway's article in The Law Journal, Vol. CX, p. 20.
[8] [1954] V.L.R. 183.
[9] [1954] V.L.R. at p. 192, see also Lush, L.J., in *Peters* v. *Leeder* (1878), 47 L.J.Q.B. 573, *post*, for a similar remark.
[10] [1898] 1 Q.B. 205.
[11] [1898] 1 Q.B. at p. 224.
[12] (1870), L.R. 5 C.P. 113.

an intermeddler.[13] Thus whilst a named executor may have a certain amount of authority,[14] his acts will make him liable as an executor *de son tort*[15] unless he regularizes his position by a grant of Probate and the consequent operation of the doctrine of relation back.[16]

But acts which are not done in order to assume control over the assets of the deceased but merely in an emergency or in order to preserve them for the rightful representatives, such as giving directions for the funeral and paying for it out of the moneys of the deceased,[17] locking up the assets of the deceased or feeding his cattle,[18] do not constitute the person performing them an executor *de son tort.*

Furthermore, since the courts are loath to see an infinite chain of executors *de son tort,* it has been held that the mere receipt of goods from an executor *de son tort,* even if with knowledge of the other's wrongful title, does not make the recipient an executor *de son tort.*[19] A greater amount of interference amounting virtually to a claim of executorship will be required by the courts before a person will be held liable as an executor *de son tort* if there is a lawful executor at the same time.[20]

The liability of an executor de son tort

An executor *de son tort* has all the liabilities but none of the rights and privileges of an executor,[21] but only in respect of those assets which he has dealt with,[22] though he will be liable for the acts of his agent.[23] Thus an executor *de son tort* will be liable to account to the rightful executor,[24] and to give security for the safety of the assets of which he has possessed himself.[25] He is also liable in the same manner as a rightful executor for the debts of the

---

[13] See also *Re Ryan, Kenny* v. *Ryan* (1897), 1 I.R. 513.

[14] See *Whitmore* v. *Lambert,* [1955] 1 W.L.R. 495 at 501.

[15] *Parten* v. *Baseden's Case* (1676), 1 Mod. Rep. 213.

[16] *Hill* v. *Curtis* (1865), 35 L.J. Ch. 133.

[17] *Harrison* v. *Rowley* (1798), 4 Ves. 212.

[18] Per Lush, L.J., in *Peters* v. *Leeder* (1878), 47 L.J.Q.B. 573 at p. 574, and also see *Kerr* v. *Mills* (1888), 5 W.N. (N.S.W.) 33.

[19] *Paull* v. *Simpson* (1846), 9 Q.B. 365.

[20] *Read's Case* (1604), 5 Co. Rep. 33b.

[21] *Stratford-Upon-Avon Corporation* v. *Parker,* [1914] 2 K.B. 562 at p. 567.

[22] *Ex parte Public Trustee Re Birch* (1951), 51 S.R. (N.S.W.) 345.

[23] *Re Ryan* (1897), 1 I.R. 513.

[24] *Sharland* v. *Mildon* (1846), 5 Hare 469.

[25] *Jones* v. *Yarnold* (1728), 2 Lee 570.

deceased[26] and to pay probate duty on the assets under his control.[27] An action for the breach of a contract by the deceased cannot be brought against the executor *de son tort*[28] and on the other hand an executor *de son tort* has no right of action against a third party not interested in the estate.[29]

At common law[30] an executor *de son tort* had no right of retainer and could not pay himself a debt or legacy,[31] even if he had the assent of the rightful administrator.[32]

The executor or administrator of an executor *de son tort* is liable at common law for the acts of the deceased,[33] but probably this principle does not extend to the executor *de son tort* of an executor *de son tort*.[34]

An executor *de son tort* cannot get rid of his liability by handing over the assets to the rightful personal representative, certainly not if he does so after action is brought.[35] WOOD, V.C., in *Hill* v. *Curtis*[36] said: "It seems to be quite clear at law that a person once becoming an executor *de son tort* cannot deliver himself from the consequences of his act or free himself from any action to be brought upon it unless he have, previously to the action, paid or handed over the property."

It is doubtful whether this exception extends to cases where the intermeddler has gone further than merely taking the assets under his control and has in fact acted in the character of an executor. HOLT, C.J., in an Anonymous Case[37] suggested that he would be chargeable then at all events. In *Hill* v. *Curtis* the defendant had in fact administered the estate but, as it was found, with the authority of a person who later took out Letters of Administration. The *ratio decidendi* in that case then depends on the doctrine of relation back and the above quotation is an *obiter dictum*.

---

[26] *Townsley* v. *Ingham* (1633), Clay 6.
[27] *New York Breweries Co.* v. *Attorney-General*, [1899] A.C. 62.
[28] *Wilson* v. *Hodson* (1872), L.R. 7 Exch. 84.
[29] *Joncas* v. *Pennock & Durstling* (1958), 24 W.W.R. 325.
[30] But see now s. 28, *Administration of Estates Act* 1925 (Imp.).
[31] *Colter* v. *Ireland* (1598), Moore K.B. 527.
[32] *Vernon* v. *Curtis* (1792), 2 Hy. Bl. 18.
[33] Anon. (1678), 2 Mod. Rep. 293.
[34] *Hammond* v. *Gatliffe* (1738), Andr. 252.
[35] *Vernon* v. *Curtis* (1792), 2 Hy. Bl. 18.
[36] (1865), 35 L.J. Ch. 133 at 135.
[37] (1702), Holt K. B. 44.

The authority of an executor de son tort

Acts done by an executor *de son tort* in relation to the assets of the deceased bind the legal personal representative if the act was such that it would have been lawful for a legal personal representative to perform and if the executor *de son tort* really acted in the character of executor so that the party dealing with him might reasonably suppose him to be the rightful representative.[38] Thus whilst a single act might be sufficient to make a person liable as an executor *de son tort*, it will not be sufficient to give the intermeddler the character of executor to such a degree that his act will be binding on the lawful representative.[39]

As to real estate there has long been a doubt whether the acts of an executor *de son tort* can validly make title. In the early New South Wales decision of *Rose* v. *Woodland*[40] HARGRAVE, P.J. in Eq., held that an executor *de son tort* could pass at least the beneficial title to land, and restrained by injunction the heirs-at-law of the deceased from taking ejectment proceedings against the occupiers of the land who claimed title through the executor *de son tort*. However, in *Stratford-Upon-Avon Corporation* v. *Parker*,[41] where it was sought to make an executor *de son tort* liable on a covenant to repair contained in a lease which had been vested in the deceased, LUSH, J. stated[42] that an intermeddler becomes "subject to the liabilities that an ordinary executor is subject to in respect of the assets with which he has intermeddled, but he has none of the privileges or benefits of the ordinary executor and does not by operation of law or otherwise become entitled to the term of years which has never been assigned to him".[43] In *Ex parte the Public Trustee Re Birch*[44] the Full Court of the New South Wales Supreme Court said[45] "An executor *de son tort* is only liable to account for assets which he has taken into his possession and dealt with. He renders himself subject to certain liabilities and obligations but he acquires no rights, nor can his intervention provide a good root of title".[46]

Furthermore, it seems than an executor *de son tort* cannot confer a title even to personalty which is good as against third parties except the lawful representative. Though there are *obiter dicta* to the effect that if an executor *de son tort* acts as executor and the party dealing with him has reason to suppose that he has authority as such, his

[38] *Thomson* v. *Harding* (1853), 2 E. & B. 630.
[39] *Mountford* v. *Gibson* (1804), 4 East. 441.
[40] (1867), 6 S.C.R. (N.S.W.) Eq. 50.
[41] [1914] 2 K.B. 562.
[42] [1914] 2 K.B. at p. 567.
[43] See also Mann, C.J., in *Re Fowles*, [1932] V.L.R. 13 at p. 15.
[44] (1951), 51 S.R. (N.S.W.) 345.
[45] (1951), 51 S.R. (N.S.W.) at p. 351.
[46] See also *Public Trustee* v. *Booth*, [1954] V.L.R. 183 at p. 192.

act shall bind the rightful executor and alter the property,[47] it was held in *Hounslow* v. *Fountain*[48] that an executor *de son tort* could not confer a title as would suffice to maintain trover against a wrongdoer.

Statutory intervention

A statute dealing with executors *de son tort* was passed as long ago as the reign of Elizabeth I.[49] This statute was of very limited application[50] and the present English legislation on the subject is now contained in s. 28 of the *Administration of Estates Act* 1925 (Imp.) which reads as follows:

> "If any person to the defrauding of creditors or without full valuable consideration obtains receives or holds any real or personal estate of a deceased person or effects the release of any debt or liability due to the estate of the deceased, he shall be charged as executor of his own wrong to the extent of the real and personal estate received or coming into his hands or the debt or liability released after deducting (a) any debt for valuable consideration and without fraud due to him from the deceased person at the time of his death and (b) any payment made by him which might properly be made by a personal representative."

Similar legislation exists in Tasmania,[51] and in Victoria s. 33 of the *Administration and Probate Act* 1958 is virtually the same, except in that it omits subclause (a) of the English section authorizing the deduction of debts due to the executor *de son tort*. The other Australian States do not appear to have any legislation on this subject.

Though the legislation is wide enough in its terms to make acts "of charity and necessity" and the mere receipt of goods from an executor *de son tort* amount to intermeddling contrary to the accepted position at common law, it is submitted that the definition of the executor *de son tort* contained therein should be read subject to the common law and therefore that the abovementioned qualifications will prevail. The fact that there are no decisions on the legislation either in England, Victoria or Tasmania indicates to some extent that it has not been regarded as a radical departure from the common law. The only variation applicable in England and Tasmania is the deduction under certain conditions of debts due to the executor *de son tort*. In Victoria the legislature did not even desire to depart that much from the common law.

---

[47] *Thomson* v. *Harding* (1853), 2 E. & B. 630 at p. 640.
[48] (1846), 7 L.T.O.S. 94 N.P.
[49] (1601), 43 Eliz. I c 8.
[50] See *Vernon* v. *Curtis* (1792), 2 Hy. Bl. 18.
[51] Section 29, *Administration and Probate Act* 1935 (Tas.).

Summary

Assuming then that statutory intervention has done little to affect the common law position in those jurisdictions where it has taken place, the present position may be summed up as follows:

1. Where there is no rightful executor any assumption of control over the assets in a deceased estate may make the intermeddler liable, whether the action is in effect tortious or under some claim of authority as by a named executor who has not yet proved his will. But there is no liability where the intention is not so much to exercise control over the assets as to preserve them or use them in an emergency (acts of charity or necessity). Where there is a rightful executor then the assumption of control must be accompanied by an assertion of the right to act as executor in order to make the intermeddler liable.

2. The executor *de son tort* is liable in the same manner as the rightful executor in respect of the assets under his control and also liable to account for those assets to the rightful executor. He cannot get rid of this liability unless he hands over the assets to the lawful representative before action brought, of which exception he can probably only avail himself if he has intermeddled without purporting to act as executor.

3. The executor *de son tort's* only authority is to bind the legal personal representative if certain conditions are fulfilled. Beyond that he cannot give any valid title, certainly not to realty and most probably not to personalty either.

BOOK NOTES

LAW LIST

Law List of Australia and New Zealand, 47th Edition, 1960. (Butterworth & Co. (Aust.) Ltd.)

LEGAL PROBLEMS

Current Legal Problems, by G. N. Keeton and G. Schwarzenberger. (Stevens & Sons.)

LICENSING

Licensing Guide, 2nd Edition, by M. Underhill. (Solicitors Law Stationery Society.)

Australian Conveyancer and Solicitors Journal, September, 1960.

LESSOR'S LIABILITY FOR STRUCTURAL REPAIRS (A consideration of Granada Theatres Ltd. v. Freehold Investments (Leytonstone) Ltd., [1958] 2 All E.R. 551; [1959] 2 All E.R. 176).

by

EVAN C. LEWIS, B.A., LL.B.
Barrister-at-Law

Modern developments in building techniques have emphasized the necessity for a finer distinction between those portions of premises which are normally the subject of an obligation to maintain and repair on the part of the tenant and those which are the responsibility of the landlord. At a time when building construction was conducted by a fairly standardized procedure and with materials designed to endure a long period of time, a distinction between the structure of a building, meaning its essential framework on the one hand, and its decoration or adornment on the other, was comparatively simple. However, in the modern use of composite structures containing plastics, laminates and a multiple variety of adhesives which adorn as well as support and constitute the building, the apparently simple distinction becomes far more difficult.

Method of approach

Some light is thrown upon the method of approach to this problem by the decision of VAISEY, J., in *Granada Theatres Ltd.* v. *Freehold Investments* (*Leytonstone*) *Ltd.*, [1958] 2 All E.R. 551, which was partially affirmed by the Court of Appeal in [1959] 2 All E.R. 176. In that case there was a lease of a cinema whereby the lessor covenanted to repair maintain and keep the main structure, walls, roof and drains of the demised premises in good structural repair and condition. However, an express exception was made to the obligation imposed by this covenant in so far as the tenants were liable under their covenants and the tenants' covenant was to keep the demised premises in good and substantial repair and condition and properly decorate it with the following proviso: "but nothing in this clause contained shall render the [tenants] liable for *structural repairs of a substantial nature* to the main walls roof foundations or main drains of the demised building".

The questions that arose for decision were whether the repair of certain cement rendering on the walls and of slates on the roof were structural repairs of a substantial nature within the meaning of the tenants' covenant. This involved a consideration in particular of the phrases "structural repairs" and "of a substantial nature". VAISEY,

J., at pp. 552-3, referred to *Woodfall on Landlord and Tenant* (25th Ed.) at p. 770, paragraph 1732, in which it is stated that the expression "structural repairs" had never been judicially defined and where it is submitted that they are repairs which involve interference with, or alteration to the framework of the building. His Honour states that he would say that "structural repairs" means repairs of or to a structure and that if the simple criterion is between structural or decorative, in that case they were certainly not dealing with decorative repairs.

Meaning of substantial nature

He went on to consider the meaning of the words "of a substantial nature" and refused to follow *Terry's Motors* v. *Rinder*, [1945] S.A.S.R. 167, where he says, "substantial" is pilloried as a word devoid of any fixed meaning and as being an unsatisfactory medium for conveying the idea of some ascertainable proportion of the whole. Instead, he followed *Palser* v. *Grinling*, *Property Holding Co. Ltd.* v. *Mischeff*, [1948] 1 All E.R. 1; [1948] A.C. 291, in which it was stated that "substantial" does not mean "not substantial" but is equivalent to "considerable".

The reasoning of VAISEY, J., was in the main approved by each of the three members of the Court of Appeal, where JENKINS, L.J., at p. 180, posed the problem as follows: "The questions in this case are in substance (a) whether certain works of repair done or needing to be done (i) to the main roof (formerly slated), and similar back roof (at all material times covered with asbestos sheeting) of the auditorium of the cinema, and (ii) to the front elevation (consisting of a nine-inch brick wall rendered with cement) of the demised premises, or any and if so which of these works are repairs of the description for which the landlords are liable on the true construction of these ill-drawn covenants; and (b) if so, whether the tenants have lost or are precluded from asserting their rights in respect thereof on one or other of the grounds relied on by the landlords, to which I will later refer."

Cement rendering

The action consisted of a claim by the tenants against the landlord for damages for the cost incurred by the tenants in executing roof repairs and for a declaration that on the true construction of the lease the repairs to the front elevation of the cinema were the liability of the landlord. A number of matters were raised by counsel for the landlord in defence of the claim. In regard to the front elevation of the premises it was argued that although the walls consisting of bricks and mortar could be described

as a part of the structure, the cement rendering is principally decorative and should be treated in the same category as a coat of paint. The tenant's argument on the other hand was that the bricks and cement should be taken together as constituting the wall. In accepting the latter view, JENKINS, L.J., drew attention to the evidence from which the proper conclusion appeared to him to be that the cement rendering (which appears to have been from three-eighths to seven-eighths inch in thickness) set up a chemical reaction in the bricks of the nine-inch wall, and that this chemical reaction, coupled with the effect of water seeping down between the rendering and the wall and the effects of frost, caused the bricks to deteriorate and the rendering to come away from the wall, taking with it a considerable proportion of the outer ends and sides of the bricks.

One interesting speculation is the extent to which his view that the part of the building requiring repair was a part of the structure is dependent upon the degree of adhesion of the cement rendering to the bricks, the effect of the chemical reaction or the fact that a considerable portion of the bricks had been taken away with it. One might wonder, for example, whether if the walls had been covered with tiles or laminates joined to the bricks by adhesive and these coverings had fallen away without injuring the bricks their repair would be structural or decorative. No further light is thrown upon this type of problem by judgments of ROMER, L.J., or ORMEROD, L.J.

Protection or decoration

In an earlier paragraph of the edition on *Woodfall* quoted by VAISEY, J., reference is made to the decision of the Court of Appeal in *Crawford* v. *Newton* (1886), 36 W.R. 54, in which it was held that a tenant who agreed to keep the inside of the premises in tenantable repair was only bound to paint and paper so as to prevent the house from going to decay as distinct from mere ornamentation. Although this decision is not referred to in the *Granada Case*, it is submitted that the same principles were applied and that the test adopted by the Court of Appeal in both cases was that structural repairs included such works as are necessary to preserve the structure as distinct from those which constitute a gloss upon the structure to make it more appealing. Applying this test it may be said that the cement rendering forms a protective coat over the brickwork and while from some points of view it may make a finish which is more attractive, at the same time its principal purpose is to preserve. The same might be said of an undercoat of paint but later finishes may be purely decorative.

Building itself

It is submitted further that structural repairs are confined to repairs to the structure of the building itself and not to structures attached to the building (compare *Borough Billposting Co. Ltd.* v. *Manchester Corporation*, [1948] 1 All E.R. 807). Similar principles were applied to the roof covering which was also designed to protect the structure.

The next question that arose was whether the particular repairs involved were "of a substantial nature". One matter that was argued was that the state of the repair which existed at the time when demand was made upon the landlord by a schedule of dilapidations, was the result of a series of occurrences, each one of which was minor in itself but leading ultimately to considerable disrepair. As each of these occurrences was not in itself considerable, it was argued that it was the responsibility of the tenants and it was further argued that where damage occurred as a result a series of matters each of which was the responsibility of the tenants, the resultant sum of these could not be taken to be the responsibility of the landlord. JENKINS, L.J., with whom ROMER, L.J., and ORMEROD, L.J., agreed in this respect, dealt with the argument on the basis that the tenants were recent assignees of the term and that the bulk of the damage arose before the assignment. He said: "An assignee of a term is not liable for particular breaches of tenants' repairing covenants committed by his predecessors. He is, of course, liable for the disrepair of the premises as they stand when he takes over, so far as their state of disrepair falls within the scope of the tenants' repairing covenants, but particular breaches committed before the assignment to him as distinct from the state of the premises when he takes over, are matters, generally speaking, with which he is not concerned." He also dealt with the argument from the points of view of pleading and procedure but these were merely subsidiary answers. It is interesting to note that, upon the basis of this judgment, the landlord was considerably prejudiced as a result of the assignment and it is submitted that the fact that there are antecedent breaches of a covenant to repair would in many cases amount to a sufficient reason for refusal to consent to an assignment even where the proviso such as that contained in s. 133B (1) of the Conveyancing Act 1919 applies.

Refusal to allow landlord to repair

The matter upon which the majority of the Court of Appeal differed from VAISEY, J., was whether the action of the tenants in themselves repairing the roof prevented the landlord from doing it and so justified the landlord's breach of covenant. The principal argument in this regard

related to whether the tenants were justified in refusing to allow the landlords to carry out the repairs as proposed by the landlords. Both ROMER, L.J., and ORMEROD, L.J., were satisfied that the landlords gave the tenants sufficient notice of the work which they proposed to do but they referred back to VAISEY, J., the question whether the work so proposed was a proper compliance with the landlord's covenant. It follows from this judgment that where a landlord proposes to carry out work in compliance with his obligations under a covenant in a lease there is no necessity for him to give a detailed specification of the proposed work but a general description of it will be held to be sufficient. The risk that a tenant runs that the work may not be properly carried out appears to be adequately countered by his right to claim for damages.

BOOK REVIEW

VICTORIAN COMPANIES ACT 1958 by W. E. Paterson and H. H. Ednie, B.Com., LL.B. (Hons.), A.A.S.A. (Prov.), *Barristers-at-Law* (BUTTERWORTH & CO. (AUST.) LTD., 1960).

The authors have produced an up-to-date practice book of 726 pages on Victorian Company law and practice. It takes the basic form of publishing the text of the Victorian *Companies Act* 1958 annotated section by section. The *Companies Act* 1958 came into operation on 1 April 1959. This book was written by November 1959 and published in 1960.

The new Act makes some important changes in the content of company legislation in Victoria and almost halves the length of the previous Acts. Some retained sections which may be familiar in content have been re-grouped and re-numbered.

By means of a useful introduction, a comparative table of cases, an index and section notes, the authors help readers to find their way through the Act and to sections in point and to the relevant case law. The references to company case law which has developed since 1938 are timely as well as valuable. A table of cases is provided.

In many instances the authors summarize the history of the section in question and provide references to precedents and forms of assistance in company drafting.

A feature of this book is that after the main treatment of the *Companies Act* 1958 the authors conveniently draw together and set out the Companies Regulations 1958, the official listing requirements of the Stock Exchange, extracts from the *Bankruptcy Act* 1924-1959, extracts from the Bankruptcy Rules 1934-1958, extracts from the Victorian *Stamps Act* 1958, some notes on the office practice of the Registrar-General's Office, and the Rules (and forms) of the Supreme Court of Victoria 1944. New Supreme Court (Companies) Rules have not yet been promulgated. It would be helpful if the new Rules were to be published as an indexed supplement when promulgated. In the meantime the Rules of 1944 remain operative.

The authors have presented a useful, timely and up-to-date guide to the content, interpretation and professional use of the Victorian *Companies Act* 1958.

J. F. KEARNEY.

CASE NOTE

Divorce and Cruelty

Divorce—cruelty to children by husband—resulting impairment of wife's health—no need to prove express intention by husband to injure wife's health. — In an action for divorce by a wife on the ground of the husband's cruelty, the wife's main allegations were directed to the husband's ill treatment of two children of the marriage by beating them on the head and ears with his hand, causing great distress and ill health to the wife. The trial judge found that the treatment of one of the children by the husband was unjustifiable and that the husband's conduct in this way impaired the health of the wife.

The Court of Appeal held that where, as in the present case, the conduct of the husband towards a child of the marriage is unjustifiable then it is unnecessary to aver or prove an express intention of the husband to injure his wife's health. Their Lordships pointed out that it was laid down in a line of cases beginning in 1901 that indecent assaults on a child of the marriage or of one of the spouses and sexual offences against third parties may amount to cruelty to the innocent spouse even though in committing those acts the husband had no actual intention to injure his wife as conduct which is the consequence of mere obtuseness or indifference could none the less be cruelty. They went on to say that there is no difference in principle between cases of indecent assault on a child of the marriage and cases of ill treatment by beating of a child. The distinction is merely that in the former case no evidence is required to establish that an indecent assault is an unjustifiable act whereas in the latter it must be shown that what was done was more than reasonable chastisement and was unjustifiable. Where the act relied on was indecent assault on a child of the marriage the court would require little, if any, evidence to be persuaded that the husband knew, or must have known, that his conduct would, or would be likely to, injure his wife's health. However, where the wife was relying on ill treatment by beating of the child, then she must prove facts from which the court should infer that the husband knew, or must have known, that his conduct would, or would be likely to, injure his wife's health but it was unnecessary to prove that the purpose was expressed in words.

The Court refused to follow the view taken by SIR JAMES HANNEN in *Birch* v. *Birch* (1873), 28 L.T. 540, and by BUCKNILL and SOMERVELL, L.JJ., in *Kaslefsky* v. *Kaslefsky*, [1950] 2 All E.R. 398 at p. 401, that brutality to the child would not amount to cruelty to the wife unless

shown to have been done for the express purpose of wounding the wife's feelings in such a way as to injure her health. Instead, their Lordships in the present case applied the decision of the Court of Appeal in *Squire* v. *Squire*, [1948] 2 All E.R. 51, which was approved in the House of Lords in *Jamieson* v. *Jamieson*, [1952] A.C. 525, that the principle that a person must be presumed to intend the natural and probable consequences of his acts is applicable to acts which are alleged to amount to cruelty in the Matrimonial Causes Jurisdiction. Therefore it was unnecessary, in order for it to constitute cruelty, that the conduct complained of should have proceeded from malignity or an intention to injure the complaining spouse (*Wright* v. *Wright*, [1960] 1 All E.R. 678, HODSON and HARMAN, L.JJ., and HAVERS, J. (Court of Appeal)).

BOOK NOTES

COMMON MARKET

Common Market Fiscal Systems (British Tax Review Guide No. 2), by E. B. Northcliffe. (Sweet & Maxwell.)

FINANCE

Money at Work (2nd Edn.), by Milton Grundy (Editor). (Sweet & Maxwell.)

TAXATION

Tax Tables & Tax Reckoner, 1960/61, by G. Whillans. (Butterworth & Co.)

LEGAL EDUCATION

Journal of the Society of Public Teachers of Law, Vol. 5, No. 3 (June, 1960). Edited by P. H. Lawson. (Butterworth & Co.)

OF SPECIAL INTEREST TO CHRISTIAN PEOPLE

THE BRITISH AND FOREIGN BIBLE SOCIETY

GRANTED ROYAL CHARTER 1948.

The British and Foreign Bible Society was founded in 1804 with the single purpose of circulating the Holy Scriptures, and the Holy Scriptures only, without note or comment. The Society has never been identified with any one Christian communion, nor with any party within or without the Church. It has sought to serve all the servants of God and to draw its support from all.

THE BRITISH AND FOREIGN BIBLE SOCIETY has Five Characteristics which make it an Ideal Beneficiary:—

1. Its purpose is definite and unchanging.
2. Its record is amazing.
3. Its scope is far-reaching.
4. Its activities can never be superfluous — MAN WILL ALWAYS NEED THE BIBLE.
5. Its significance is Eternal.

Correspondence and enquiries from:

THE VENERABLE ARCHDEACON H. M. ARROWSMITH, M.B.E.
COMMONWEALTH SECRETARY,
95 BATHURST STREET,
SYDNEY

Telephone MA 4938

or to the State Secretaries at the following addresses:—

361 George Street, Brisbane
95 Bathurst Street, Sydney
241-3 Flinders Lane, Melbourne
44 Brisbane Street, Launceston
73 Grenfell Street, Adelaide
167 St. Georges Terrace, Perth
Garema Place, Civic Centre, Canberra.
Mary Street, Port Moresby

DIRECTORY OF REAL ESTATE AGENTS, AUCTIONEERS AND VALUERS

CRONULLA

C. J. MONRO PTY. LTD.
Curranulla St. (opp. station).
LB5324-5.
Also Sutherland.

KINGS CROSS

WM. JAMES & ABRAHAMS PTY. LTD.
20-22 Kellett Street.
Real Estate Agents, Auctioneers and Valuers.
FL4021.

NEUTRAL BAY

CROLL & CO. PTY. LTD.
179 Military Road.
Real Estate Agents, Homes and Investments.
XY1311, XY1312.

PETERSHAM

A. H. TAYLOR PTY. LTD.
Real Estate Agent,
Auctioneer and Valuer.
448 Parramatta Rd., Petersham.
Valuations for Probate.

SYDNEY

HOOKER, L. J., LIMITED.
98 Pitt Street, Sydney.
Estate Agents, Auctioneers, Valuers and Hotel Brokers.
BW8401 (10 lines).

HOBART, TASMANIA

FREEMAN, DUFF & CO.
148 Collins Street.
Auctioneers, Real Estate and Insurance Agents & Valuers.
7487-8.

All communications should be addressed to:

EDITORIAL DEPARTMENT
BUTTERWORTH & CO. (Australia) LTD.
6-8 O'Connell Street, Sydney.

W. E. Smith Limited, Webb and Boundary Streets, Croydon, N.S.W.